

December 11, 2009

City Council, City of Tukwila
Department of Community Development
6200 Southcenter Blvd.
Tukwila, WA 98188
tukcouncil@ci.tukwila.wa.us

**Re: Council Meeting – December 14, 2009
Shoreline Master Program update**

Dear Council Members:

My company represents Schneider & Schneider L.L.C. Our client owns the South Center Plaza building, located at 14900 Interurban Avenue South in Tukwila. The building is 57,029 square feet and is used for multi-tenant office space. The property is located on the Green River.

I am writing on behalf of Schneider & Schneider L.L.C. in support of the attached amendments to the Shoreline Master Program. These amendments have been presented by Desimone Trust and are specific to buffer reduction, nonconforming use and nonconforming structure. We appreciate your consideration in this matter.

Regards,



Jed F. Stansfield

JSH Properties, Inc.

Proposed Amendment Creating Alternative Buffer Reduction Process For Non-Leveed Properties in Urban Conservancy and High Intensity Shoreline Environments

Add the following language to SMP Section 7.7.C (Following Figure 4 and before "Buffer Levee Area" of Section 7.7.C add the following), to SMP Section 7.8.B (Following Figure 7 and before the paragraph that begins "As an alternate to the 100 foot buffer..." of Section 7.8.B add the following), and to TMP 18.44.050.D & 18.44.060.D:(renumber as paragraphs 2-3(e)(iii)):

Buffer widths for non-levee properties within the Urban Conservancy Environment, may be reduced by the Director of Community Development or his/her designee by up to 50 % if an applicant demonstrates that a reduction (1) will provide enough area to achieve a 2.5:1 slope plus 20 feet from the top of the slope ; and (2) will not result in any adverse impact to the river or remaining buffer, following reduction. To demonstrate that reduced buffer will provide enough area to achieve a 2.5:1 slope plus 20 feet and that no adverse impacts will result from the proposed buffer reduction, the property owner must submit a report from a Geotechnical Engineer or other qualified professional concluding that there is sufficient area for a 2.5:1 slope, that the reduced buffer will have no impact to the stability of the river bank, and that no flood hazard or other life/safety issues will result from the buffer reduction.

Further, if an existing buffer is vegetated, a buffer enhancement plan shall be required to demonstrate how the function and values of the buffer and river will be improved. If the existing buffer has been disturbed and/or is not vegetated, an enhancement plan shall be required that identifies measures to enhance the buffer functions and values. Enhancement plans are subject to approval by the Director of Community Development. In reviewing the enhancement plan, the director will review whether the plan has implemented two or more of the measures from sections A, B, and/or C. This section is not intended to require a property owner to implement measures from each of sections A, B, and C below.

A. Riparian Buffer Restoration and/or Enhancement

1. Invasive species are to be removed by hand where appropriate; small wheeled tractors may be used in large areas where no structures are located.
2. Existing river bank and new buffer areas should be planted with native vegetation that represents both woody (trees and shrubs) and herbaceous species.
3. Trees shall be planted at spacing adequate to establish canopy and dependant on existing site conditions.
4. All planting shall be in compliance with Section 9.10 Vegetation Protection and Landscaping.

B. Water Quality and Pollutant Removal (Stormwater Runoff)

1. Favorable consideration will be given to those properties that replace existing catch basins along right of ways and in existing parking lots with units capable of filtering oils, garbage, and heavy metal particles from stormwater.
2. Removal of portions of existing impervious surfaces, outside of the buffer, and replanted with pervious paving materials to restore hydrologic connection and reduce the amount of polluted stormwater runoff.
3. As part of building remodels the owner, where appropriate, should consider the incorporation of the following building techniques:
 - Rooftop Rain Gardens
 - Water re-use for on-site landscape irrigation
 - Installation of solar panels.

C. Bank Stabilization

Significantly degraded river banks that are actively eroding and have little or no riparian vegetation shall be stabilized using acceptable bioengineering techniques to include

1. Log structures
2. Bank Resloping
3. Riparian Zone Restoration

D. Perpetual Protection

All river buffer reduction projects shall be protected in perpetuity through a conservation easement, placement in a separate tract, deed transfer, or other legally binding agreement. The location and limitations associated with the river and its buffer shall be shown and recorded with a Notice on Title with the King County Auditor.

E. Monitoring Requirements

Monitoring is required for all buffer reduction projects. The objective of monitoring is to quantify the success of the enhancement plan. The success of such projects must be guaranteed and documented in annual monitoring reports for a period of 3 years after completion of the project. Successful enhancement projects should result in river segments with stable banks, in-river habitat, and/or a healthy riparian buffer.

Monitoring reports must include a narrative description and photos accurately depicting the river and riparian habitat. Monitoring requirements must also include habitat assessments to document pre- and post- project habitat conditions. Annual riparian vegetation surveys documenting the survivorship of planted riparian species are required for all buffer reduction projects that include a riparian restoration component.

A qualified biologist or environmental specialist should complete the monitoring reports. The first monitoring report should be submitted at the beginning of the first growing season after completion of the enhancement plan and should be submitted annually for a period of 3 years.

1. Narrative Description/Photos

The narrative should include a description of the physical condition of the river buffer including a description and photos of observed aquatic life, bank stability, in-river habitat, substrate, and riparian zone.

2. Habitat Assessment

A pre-project habitat assessment must be completed to document existing conditions within the river buffer. A second post-project habitat assessment must be completed at the end of the required monitoring period. A comparison of the two assessments will help quantify the ecological gain of the enhancement plan.

3. Riparian Vegetation Survey

An annual detailed vegetative survey including photos of the riparian plantings is required for all buffer reduction projects that include riparian restoration. The survey should be completed during the normal growing season. Planted riparian species must be guaranteed at a 75% survivorship for the duration of the required monitoring period.

Justification: The justification in the SMP for buffers for non-leveed properties is to provide sufficient area to allow for a 2.5:1 slope, which the City considers to be a stable slope, plus 20 feet. According to the SMP, the City considers a 50-foot buffer to be the minimum necessary to provide for a 2.5:1 slope plus 20 feet, and imposes such 50 foot buffer on residential properties in the Residential Environment. For similar nonleveed properties in the Urban Conservancy and High Intensity Environment, the City presumes a 100 foot buffer is necessary to provide for a 2.5:1 slope plus 20 feet, and will only allow a reduction up to 50 feet only if the buffer is resloped to a 2.5:1 slope with a 20-foot setback from the top of the slope.

While residential property owners benefit from a presumption in the SMP that a 50-foot buffer is sufficient to achieve a 2.5:1 slope plus 20 feet, commercial/industrial owners of nonleveed properties are not allowed a buffer reduction to up to 50 feet even if they can prove that the reduced buffer is sufficient to achieve a 2.5:1 slope plus 20 feet. Instead, the SMP requires commercial/industrial owners to actually reslope the bank, a very expensive and time consuming proposition given not just the cost to do so but also the federal, state and local permits required.

This is unfair and unreasonable. If the purpose of the buffer is to provide for sufficient area to allow for a more stable slope of 2.5:1 plus 20 feet, then a commercial/industrial owner of a nonleveed property should be allowed, at the time of development or redevelopment of the property, to obtain a buffer reduction if it can demonstrate that there is sufficient area in a reduced buffer to allow for a 2.5:1 slope plus 20 feet and that such reduction would not otherwise adversely affect shoreline functions and values. And further, like residential property owners,

they should be allowed to achieve up to a minimum 50-foot buffer reduction if they can make that showing. Such a buffer reduction process for nonleveed properties is consistent with the SMP's rationale for buffers for nonleveed properties, including the following rationale for the Residential Environment Buffers (which applies equally to nonleveed properties in the Urban Conservancy/High Intensity Environments), and the science¹:

The proposed buffer area for the Shoreline Residential Environment will allow for removal of invasive plants, planting of native vegetation in the riparian zone and inclusion of other features to improve shoreline habitat. ***It also will prevent the placement of any structures in an area that could potentially prove unstable. In the event of bank erosion or slope failures, the buffer will provide sufficient space for re-sloping the bank to a more stable 2.5:1 slope, either through bank stabilization projects or through natural bank failures that result in the natural angle of repose (2.5:1 or greater).***

SMP, Section 7.6, p. 62 (emphasis added)

¹All of the scientific justification in the record supporting the need for a 2.5:1 slope relates solely to levee profiles for construction and repair of levees. It does not support a conclusion that all, existing nonleveed banks should and must be resloped to a 2.5:1 slope without armoring in order to achieve a stable bank or to protect existing or new development from flood hazards. In fact, resloping a stable, armored bank that is steeper than 2.5:1 to a 2.5:1 unarmored bank may make the existing bank less stable and more prone to erosion. Even so, if the City believes that a buffer large enough to support a 2.5:1 slope plus 20 feet is required for nonleveed properties, the proposed buffer reduction process will provide for a buffer wide enough to accomplish this purpose, for it will ensure that the buffer is wide enough to accommodate a 2.5:1 slope plus 20 feet. There is no need to require that the bank also be resloped, just like there is no need to reslope the bank for the required 100-foot buffer because it is presumed to be large enough to allow for a 2.5:1 slope plus 20 feet.

Proposed Amendment to 18.44.130(D)(2)(a) and (g)

2. Non-Conforming Structures. Where a lawful structure exists on the effective date of adoption of this chapter that could not be built under the terms of this chapter by reason of restrictions on height, buffers or other characteristics of the structure, it may be continued as an allowed, legal structure so long as the structure remains otherwise lawful subject to the following provisions:

a. Such structures may be repaired, maintained, upgraded, and altered, provided that, No such (1) the structure-structure may not be enlarged or altered in such a way that increases its degree of nonconformity or increases its impacts to the functions and values of the shoreline environment, and (2) the cost of the alterations may not exceed an aggregate cost of fifty percent (50%) of the value of the building or structure, based upon its most recent assessment or appraisal, unless the amount over fifty percent (50%) is used to make the building or structure more conforming, or is used to restore to a safe condition any portion of a building or structure declared unsafe by a proper authority. ~~Ordinary maintenance and repair of and upgrades to a non-conforming structure are permitted, including but not limited to, painting, roof repair and replacement, plumbing, wiring, mechanical equipment repair/replacement, repaving and weatherization. These and other alterations, additions or enlargements may be allowed as long as the work done does not extend further into any required buffer, increase the amount of impervious surface, or increase the impacts to the functions and values of the shoreline environment. Complete plans shall be required of all work contemplated under this section.~~

....

g. ~~Within the Shoreline Jurisdiction, existing structures that do not meet the requirements of the SMP may be altered or partially reconstructed provided that:~~

- ~~1) The new construction is within the original dimensions and location on the lot;~~
- ~~2) The new construction does not further intrude into or adversely impact the required buffer;~~
- ~~3) The use or activity within the structure is enlarged, intensified, increased or altered only to the minimum amount necessary to achieve the intended functional purpose;~~
- ~~4) The reconstruction will not create adverse impacts to shoreline ecological functions and/or processes;~~
- ~~5) For properties in non-leveed portions of the river, the applicant re-slopes the bank to a 2.5:1 or 3:1 angle as applicable depending on the property's shoreline environment designation and restores and/or enhances the entire shoreline buffer, including but not limited to, paved areas no longer in use on the property. Where an existing building would prevent the re sloping of the bank to 2.5:1 or 3:1 as applicable, the applicant must re-slope to the extent possible, remove invasive vegetation and re-vegetate according to the provisions of this chapter. For properties behind levees that do not meet the minimum profile, restore and/or enhance the remaining buffer area~~

~~and remove invasive vegetation and plant with native vegetation on the levee prism as permitted by the COE; and~~

~~_____ 6) The property owner applies for and is granted approval of a Type 2 permit.~~

~~_____ h. A non conforming use, within a non conforming structure, shall not be allowed to expand into any other portion of the structure.~~

~~_____ 3. For the purposes of this section, altered or partially reconstructed is defined as work that does not exceed 50% of the assessed valuation of the building over a three-year period.~~

Justification: Subsections 2(a) and 2(g) in the Nonconforming Structure provisions relate to permissible alterations to legal nonconforming shoreline structures. Many city and county Shoreline Master Programs, including those of Seattle, Bellevue, and King County, allow a nonconforming structure to be maintained, renovated, repaired or structurally altered so long as the alteration does not increase the degree of nonconformity. Some jurisdictions, like Renton and Auburn, place a limit on the amount of structural alterations that are allowed, typically some percentage (50-75%) of the structure's value.

Originally, as recommended by the Planning Commission, and consistent with Tukwila's current nonconforming structure provisions relating to structures that do not meet the requirements of the Sensitive Areas Overlay District (see TMC 18.70.050), Section 2(g) allowed nonconforming structures to be remodeled, reconstructed or replaced so long as it did not increase the degree of nonconformity. That is, the proposed SMP adopted an approach like Seattle and King County's. Since then, the City Council has placed so many limits in Section 2(g) on altering nonconforming structures that, as currently proposed, just about any alterations, even the minor repair and maintenance work allowed in Section 2(a), would essentially require compliance with the new SMP requirements (e.g., reslope the bank to a 2 ½: 1 slope; revegetate the buffer; etc.). Now, for all practical purposes, Section 2(a) has been written out of the nonconforming structure section since the new definition of alterations subject to Section 2(g) requirements (any work up to 50% of the structure's value), would essentially include all of the minor alterations allowed by Section 2(a).

While we understand that the City Council wants to discourage continuation of nonconforming structures by placing limits on their modification and alteration, no jurisdiction that we are aware of imposes these kinds of requirements on modification or alteration of shoreline structures. For good reason, they would be so prohibitively expensive that they would discourage even fairly minor maintenance and renovation of shoreline structures that nearly every jurisdiction allows.

While we would prefer that the City take the approach that jurisdictions like Seattle and King County do, and allow shoreline property owners to modify and alter existing legal nonconforming structures so long as they do not increase their nonconformity, we understand that the City Council desires to place a limit on such modifications and alterations to encourage redevelopment consistent with the new SMP provisions. Under these circumstances, we propose a 50% value limit on the alterations allowed to

nonconforming shoreline structures, similar to the approach taken by the City of Renton and other jurisdictions that place a limit on such alterations. Any alterations costing more than 50% of the value of the existing structure would require compliance with the new SMP requirements, including the use, buffer, vegetation and public access requirements.

Proposed Amendment to Nonconforming Use Provisions in TMC 18.44.130(E)(1)(e):

1. Non-Conforming Uses. Any non-conforming lawful use of land that would not be allowed under the terms of this SMP may be continued as an allowed, legal, non-conforming use, defined in TMC Chapter 18.06 or as hereafter amended, so long as that use remains lawful, subject to the following:

....

e. A structure that is being or has been used for a non-conforming use may be used for a different non-conforming use only upon the approval of a Type II permit subject to notice. Before approving a change in non-conforming use, the following findings must be made:

- 1) No reasonable alternative conforming use is practical;
- 2) The proposed use will be at least as consistent with the policies and provisions of the SMP and as compatible with the uses in the area as the pre-existing use;
- 3) the use or activity is enlarged, intensified, increased or altered only to the minimum amount necessary to achieve the intended functional purpose;
- 4) The structure(s) associated with the non-conforming use shall not be expanded in a manner that increases the extent of the non-conformity;
- 5) The change in use will not create adverse impacts to shoreline ecological functions and/or processes;
- 6) The applicant restores and/or enhances the ~~entire~~ shoreline buffer, including but not limited to, paved areas no longer in use on the property, to offset the impact of the change of use per the vegetation management standards of this program. The amount of buffer to be restored and/or enhanced will be determined based on the percentage of the existing building used by the nonconforming use. Depending on the size of the area to be restored and/or enhanced, the Director may require targeted plantings rather than a linear planting arrangement. The vegetation management standards of this program shall be used for guidance on any restoration/enhancement This may include the restoration of paved areas to vegetated area if no longer in use;
- 7) The use complies with the Type II permit process of TMC Chapter 18.104; and
- 8) The preference is to reduce exterior uses in the buffer to the maximum extent possible.

Justification: Many commercial and industrial structures along the river that are set back from the river consistent with current buffer requirements in the SMP will now become nonconforming because of the new buffer requirements in the SMP. These new buffer requirements will now prohibit all of the commercial and industrial uses under which these structures were lawfully developed, uses that are and will remain permitted by the underlying zoning for these properties. When any of the existing tenants in these buildings leave, if the landlord cannot find a tenant to continue the exact same use, the space in the building will have to be left vacant unless the entire shoreline is revegetated, even if the new use is otherwise allowed by the underlying zoning and will have no or less impact on shoreline functions and values, including buffers and shoreline vegetation. While it is appropriate to require the property owner to “offset the impact of the change of use per the vegetation management standards of this program,” the requirement to revegetate the entire shoreline goes far beyond any reasonable or proportional mitigation measure. Nor does any jurisdiction in Washington require this.